6-17-93

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
PSI ENERGY, INC.,	)	Docket No. EPCRA-035-92
	)	
Respondent.	)	

ORDER GRANTING MOTION TO AMEND ANSWER

Respondent, PSI Energy, Inc., has moved for leave to amend its answer to the complaint issued by the Environmental Protection Agency (EPA) in this matter. The complaint alleges that PSI failed to meet certain notification requirements under the Emergency Planning and Community Right-to-Know Act of 1986 (EPCRA) when there was a release of a reportable quantity of an extremely hazardous substance (sulfur dioxide) from PSI's facility. In moving to amend its answer Respondent seeks to assert additional facts and to add some statutory citations to support its contention that the alleged violations were subject to a legal exemption. As grounds for the motion, Respondent states that since the original answer was filed it has learned that these facts are material to the issues in this action and more particularly are important in establishing the time at which Respondent became aware that a reportable quantity of sulfur dioxide had been released. Secondly, Respondent wishes to include some statutory citations to its argument that the release was exempt from notification requirements.

Complainant, EPA, does not oppose the amendments concerning the statutory exemptions, but opposes the remainder of the motion on the grounds that the amendments contradict previously submitted evidence which established that PSI had knowledge that a reportable quantity of sulfur dioxide was released at 11:15 a.m. and not at 11:50 a.m. on February 12, 1991 as PSI now contends in its amendments. In response[1], Respondent asserts that the EPA can point to no facts submitted by PSI which clearly establishes knowledge of the amount of release at 11:15 a.m. Instead, the EPA makes inferences of the time that such knowledge was gained. As such, the EPA cannot argue that the amended answer contradicts PSI's original answer when such an inference cannot be conclusively made.

Respondent further maintains that the appropriate standard to be applied at this stage of the proceedings is to view all factual allegations and inferences which reasonably can be drawn from those facts in a manner most favorable to Respondent. When viewed as such, Respondent asserts that the amendments are completely consistent with previous allegations. Finally, Respondent asserts that granting the motion to amend would serve the interests of justice by giving Respondent an opportunity to amplify and state more accurately the factual bases for its defense.

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[1] Reply to Complainant's Memorandum in Opposition to PSI's Motion for Leave to Amend Answer, dated May 4, 1993 at 2-3.

DISCUSSION

Pursuant to 40 C.F.R. § 22.15(e) of EPA's Consolidated Rules of Procedure (CROP), "the respondent may amend the answer to the complaint upon motion granted by the Presiding Officer." The decision, therefore, is left to the discretion of the Presiding Officer. Section 22.15(e), however, offers no specific requirements or criteria to guide me in deciding whether to grant this order to amend. While the Federal Rules of Civil Procedure (Fed. R. Civ. P.) are not applicable to these administrative proceedings, consideration of the practice and precedent thereunder is not inappropriate where the applicable section of the CROP (§ 22.15(e)) embodies concepts somewhat analogous to those in the Fed. R. Civ. P.

Rule 15(a) of the Fed. R. Civ. P. states that leave to amend "shall be freely given when justice so requires." In addition, courts have shown a strong liberality . . . in allowing amendments under Rule 15(a)." 3 Moore's Federal Practice, ¶ 15.08[2] at 15-47 (2d ed. 1993). Furthermore, the Federal Rules accept the principle that the purpose of pleading is to facilitate a proper discussion of the controversy on the merits. Conley v. Gibson, 355 U.S. 41 (1957).

In Foman v. Davis, 371 U.S. 178, 182 (1962), the Supreme Court stated that leave to amend should be freely given in the absence of a finding of "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue

of allowance of the amendment, or futility of the amendment, etc. . . ." In the present case, Complainant has failed to show that the granting of this motion will result in or is prompted by any of these conditions. Complainant has only argued that Respondent's amendments to its answer are contradictory to Respondent's initial answer. Nothing, however, prevents a party from asserting additional facts in support of its position with respect to an issue or clarifying its defenses during the exchange of prehearing information and responses thereto especially when newly discovered information suggests that additional facts be offered into evidence. See Gardner v. Southern Railway Systems, 675 F.2d 949 (7th Cir. 1982) (Defendant was allowed to amend the answer to deny allegations it had previously admitted in the original answer).

Respondent's motion to amend its answer should be granted for the purpose of simplifying issues and to clarify the respective positions of the parties before any hearing may be held. The purpose of the answer is to assist the Presiding Officer in getting at the substantive truth in the case. If an amendment to the answer will assist in this regard, so much the better. Whether a party's position is consistent with and supported by evidence will be decided by the Presiding Officer at the conclusion of the hearing and not by motions preceding the hearing. It is clearly inappropriate at this stage of the proceedings to draw such a single inference from certain alleged facts, even where some factual allegations partially may have been admitted, but where more than one inference may be drawn from those alleged facts.

Therefore, Respondent should be allowed to incorporate the amendments into its answer.

ORDER

For the above reasons, the motion to amend the answer is GRANTED and the amended answer accompanying the motion is accepted as the answer herein.

So ORDERED.

Henry B. Frazier, III
Chief Administrative Law Judge

Dated: June 17, 1993
Washington, D.C.

IN THE MATTER OF PSI ENERGY, INC., Respondent
Docket No. EPCRA-035-92

Certificate of Service

I hereby certify that this Order Granting Motion to Amend Answer, dated JUN 17 1993, was mailed this day in the following manner to the below addressees:

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Doris M. Thompson
Secretary

Dated: JUN 17 1993